No. 11,339

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SANG SOON SUR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

Section 642 of Title 48, United States Code confers jurisdiction upon the Court below; and Section 645 of Title 48, United States Code grants appellate jurisdiction to this Honorable Court.

STATEMENT OF THE CASE.

The indictment in two counts charged the appellant with violation of Section 145(b), Title 26, U.S.C. (26 U.S.C.A. 145(b); Internal Revenue Code 145(b)) with wilfully, knowingly, unlawfully and feloniously evading or defeating a large part of his income taxes

for the calendar years 1942 and 1943 respectively. The specific amount evaded as laid in Count I being $3132.97 (R. p. 7), and in Count II $4684.36 (R. p. 11); and of accomplishing the same by filing a false and fraudulent income tax return for the said calendar years 1942 and 1943, stating specifically therein the items of gross income, net income, and net profit from business and rentals to be other than the true and correct figures for the said calendar years (R. pp. 7-12), and in furtherance of said scheme to evade and defeat his proper taxes due did keep and maintain and cause to be kept and maintained false, incomplete and untrue books and records of accounts falsely stating therein the amount of total receipts and the amount of net profits which he received from his business in the calendar years 1942 and 1943 respectively (R. pp. 7-11) and did conceal and cause to be concealed from the Collector of Internal Revenue and from any and all proper officers of the United States the true and correct gross and net income received by him and the sources thereof during the said calendar years 1942 and 1943. (R. pp. 8, 11-12.)

The appellant was a married individual during the calendar years 1942 and 1943, who was living with his wife and who had no dependents, and who, during all of the calendar years 1942 and 1943 maintained his legal residence and principal place of business in Honolulu. The accounting period of the business of the appellant was on the basis of the calendar year and not the fiscal year. (R. p. 5.) The appellant during the years in question, was engaged in the furniture business in Honolulu. (R. p. 111.)

The appellant, Sang Soon Sur, otherwise sometimes known as Song Soon Sur, Sun Soon Sur, or Sung Jun Shar, was indicted on December 14, 1945. He was arraigned on December 19, 1945 (R. p. 2) and on February 27, 1946, after unsuccessfully attempting to quash the indictment and moving by way of motion for a bill of particulars, both preliminary motions being denied, entered a plea of not guilty on February 27, 1946. (R. pp. 2, 3.)

Trial by jury was commenced on April 15, 1946, and concluded on April 19, 1946 (R. p. 3), at which time the jury returned a verdict of guilty upon both counts of the indictment. (R. p. 37.) On that date the defendant was sentenced upon Count I to imprisonment for a term of one year and one day and to pay a fine in the sum of $2500.00 together with costs of prosecution; and upon Count II to imprisonment for a term of one year and one day and to pay a fine in the sum of $2500.00 together with the costs of prosecution, the appellant to remain imprisoned until payment of the said fine or until otherwise discharged as provided by law—all prison sentences to run consecutively. (R. pp. 38, 39.) The appellant thereupon perfected his appeal to this Honorable Court from the judgment of the District Court of the United States for the District of Hawaii. (R. pp. 40, 45, 361, 51, 52, 40, 53, 356.)

The two specific questions involved and the manner in which they are raised in this appeal are enumerated in the statement of the case in the appellant's brief. The first question involves the admission in evidence as plaintiff's exhibits of the books and business

records of the appellant as Plaintiff's Exhibits "H", "I", "K", and "L". (R. pp. 114, 128.) The objection to the admission of these exhibits is founded upon violation of the Fourth Amendment in that their tender by the appellant and the retention by the Internal Revenue Agent of the exhibits constituted an unreasonable search and seizure. Objection to the exhibits and their admission in evidence was made for the first time by the appellant at the trial. (R. p. 125.) The appellant did not seek the return of the exhibits by motion to suppress.

The second specific question involved as enumerated in the appellant's brief is the admission in evidence of Plaintiff's Exhibits "M", "N", and "O". (R. pp. 223-258.) These exhibits constitute three separate statements or interviews reduced to writings tendered by the defendant to the Internal Revenue Agent during the course of the investigation. It was urged by the defendant at the trial that these exhibits were highly self-incriminating and virtually confessions and were not voluntarily given by the defendant. (R. pp. 184, 186, 191, 201.)

SUMMARY OF ARGUMENT.

Appellant's statement of the case as enumerated in his brief adverts to "various other matters or things" being admitted in evidence over objection of counsel for the appellant all of which were highly prejudicial to the appellant, and which deprived him of a fair trial; further urging that the errors complained of are

substantial, any one of which would require the reversal of the judgment herein. In view of the fact that these other matters adverted to in the appellant's brief are not succinctly presented as questions involved in the instant appeal, are not specific—but general—the appellee will dwell in his brief only upon those questions involved in this appeal as are specified and enumerated by the specification of errors relied upon, viz.:

1. The Court did not err in denying the appellant's motion to quash the indictment—Specification of Error No. 1. The Court did not err in denying and overruling the appellant's motion for acquittal at the conclusion of the plaintiff's case—Specification of Error No. 2.

2. The Court did not err in overruling the objection of the defendant to the receipt in evidence of Plaintiff's Exhibits "A", "B", and "C"—Specification of Error No. 3.

3. The Court did not err in overruling the appellant's objections to the receipt in evidence of Plaintiff's Exhibits "H", "I", "K", and "L"—Specification of Error No. 4.

4. The Court did not err in permitting over objection of the appellant, testimony by plaintiff's witness as to matters transpiring in the year 1945—Specification of Error No. 5.

5. The Court did not err in overruling the objection to the receipt in evidence of Plaintiff's Exhibits "M", "N", and "O"—Specification of Error No. 6.

6. The Court did not err in overruling appellant's motion to strike from the record certain portions of Exhibit "M" relative to prior criminal conviction of the appellant—Specification of Error No. 7.

7. The Court did not err in giving Plaintiff's Instruction No. 6 as modified—Specification of Error No. 8.

8. The Court did not err in giving Plaintiff's Instruction No. 19—Specification of Error No. 9.

ARGUMENT.

Appellant has elected to combine his argument upon Specifications of Error Nos. 1 and 2, asserting that they raise substantially the same point. While the appellee from the standpoint of the facts and evidence is not entirely in accord with this conclusion, it will nevertheless, for purposes of rebuttal thereto combine these two specifications.

1.

SPECIFICATIONS OF ERROR NOS. 1 AND 2.

Specifications of Error Nos. 1 and 2 are founded upon issues raised by motions filed by the appellant in the Court below, Specification of Error No. 1 being the denial of the appellant's motion to quash the indictment; and Specification of Error No. 2 being the denial of the appellant's motion for acquittal at the conclusion of the plaintiff's case. Inasmuch as

the applicable law covers both specifications, the appellee will, for sake of brevity, treat these two specifications as combined.

Appellant's motion to quash the indictment (R. pp. 13-17) urged that the income tax returns for the years 1942 and 1943 were not the returns of the appellant of income derived, had and received by him and were in truth and in fact not the returns of the appellant (R. p. 14), and further alleging that the returns were signed by the appellant in the capacity of agent of one Mong Bok, his wife. The motion further asserts that neither the business nor any incomes recited in the returns or the indictment are in fact those of the appellant, but in truth and in fact belong to his wife. The affidavit in support of the motion executed by the appellant admits the execution of the returns in question, but affirmatively alleges that the execution thereof was not in his own behalf but merely as agent for his wife; that the returns covered income derived from a furniture repair shop in Honolulu, that the business is in fact owned by his wife and not by the appellant; that all moneys and receipts received in connection with the said business were deposited in his wife's name in the Bishop National Bank of Hawaii; and that all checks for expenses incurred in the business were signed by his wife, or in the alternative, by the appellant for and on behalf of his wife. (R. p. 15.)

The plaintiff in answer to the motion to quash filed a replication and a motion to dismiss the motion to quash. (R. pp. 17-23.) The replication averred that on the nineteenth day of December 1945 and prior to

the filing of the motion to quash, the appellant did enter his general appearance in the proceedings and thereby submitted himself for all purposes to the jurisdiction of the trial Court. (R. p. 17.) The replication further denied that the returns for the years in question were prepared and filed by the appellant in the capacity of an agent for his wife (R. p. 17); and affirmatively alleges *in hacc verba* that the returns in question were in fact prepared or caused to be prepared and filed not by the appellant in a capacity as agent or other fiduciary capacity but as the joint return of the appellant herein and his wife. (R. p. 18.) Further, that the caption and signature of the return for the calendar year 1942, as Count I of the indictment, recited the election of the appellant by way of joint return in the following terms as upon said return contained:

> "Sang Soon Sur & Myung Bok Sur, 378 N. School Street, Honolulu, T. H.",

and for the calendar year 1943 a similar election as a joint return in terms as follows:

> "Mong Bok & Sun Soon Sur, 378 N. School Street, Honolulu, T. H." (R. p. 19.)

The replication is supported by the affidavit of John Glutsch, Special Agent, Bureau of Internal Revenue, United States Treasury Department. (R. pp. 21-22.) As further and distinct grounds for denial and dismissal of the appellant's motion to quash, the appellee further affirmatively averred that as a matter of law the returns of the appellant for the years 1942 and

1943 being in fact the joint returns of the appellant and his said wife do, as a matter of law, constitute joint and several liability with respect of the true and correct tax due and payable thereunder, pursuant to the provisions of paragraph 51(b), Title 26, United States Code, (26 U.S.C.A. 51(b)), and pursuant to United States Treasury Department, Bureau of Internal Revenue Regulations 111 Sections 29.51-1-(3)-(b). (R. p. 20.) As a further, alternative, and distinct grounds of the appellee's motion to quash, the appellee affirmatively averred that as a matter of law, assuming the said returns as alleged in the motion to quash to be the individual returns of the appellant's wife, that the appellant nevertheless in the premises, and acting therein as agent for his said wife, does, together with his wife as principal, assume the responsibility for preparation of the said returns and incurs the attending liabilities for the penalties provided for erroneous, false, or fraudulent returns as provided in United States Treasury Department, Bureau of Internal Revenue Regulations 111, Section 29.51-2. (R. pp. 20-21.)

That a husband and wife living together, even though one has no gross income, may elect to file a return including the income of each in a single return made by them jointly is provided in 26 U.S.C.A. 51 (b):

> "(b) Husband and wife. A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint

return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien or if the husband and wife have different taxable years. The status of individuals as husband and wife shall be determined as of the last day of the taxable year."

The liability with respect to the tax shall be joint and several. This liability is unqualified. The appellant and his wife therefore, having elected to file joint returns as such pursuant to the provisions of the statute (supra), assumed all of the attending liabilities in law flowing from the election. In this connection it is respectfully submitted that the declaration of the appellant and his wife upon the returns as being the joint return of husband and wife is conclusive in fact upon this issue of fact. The returns expressly declare that they are in fact the joint return of husband and wife, and nowhere therein does any election or reference to agency appear to rebut this fact.

It is respectfully submitted in this connection that Section 2(d) of Section 51, Title 26 United States Code (26 U.S.C.A. 51(2)(d)) further substantiates the position of the appellee herein, in that there is no denial by the appellant of the actual execution of the returns in question by him.

26 U.S.C.A. Section 51(2)(d):

"Signature presumed correct. The fact that an individual's name is signed to a filed return shall

be prima facie evidence for all purposes that the return was actually signed by him."

United States Treasury Department, Bureau of Internal Revenue Regulations 111, Income Tax, Section 29.51-1-(3)(b) is further authority for the contention of the appellee upon this point:

United States Treasury Department Bureau of Internal Regulations 111, Section 29.51-1-(3)(b):

"Joint returns.—A husband and wife, if living together at the close of the taxable year, may elect to make a joint return (see section 51(b)), that is, to include in a single return made by them jointly the income and deductions of each, even though one has no gross income. In such a case, the tax shall be computed on the aggregate income. *The liability with respect to the tax shall be joint and several.* If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year. A joint return may not be made if either the husband or wife is a nonresident alien." (Italics added.)

"A joint return of a husband and wife (if not made by an agent, see section 29.51-2) shall be signed by both spouses. An oath is not necessary, but both spouses shall verify the return as provided in section 51. If signed by one spouse as agent for the other, authorization for such action must accompany the return. (See section 29.51-2.) *The spouse acting as agent for the other shall, with the principal, assume the responsibility for making the return and incur liability for the*

penalties provided for erroneous, false, or fraudulent returns." (Italics added.)

This regulation, having the force and effect of law, requires that a joint return of husband and wife—if not made by an agent—shall be signed by both spouses, and further provides in the event a joint return is executed by one spouse as agent for the other that authorization to this effect for such action must accompany the return. No such authorization accompanied any of the returns in question. It further affirmatively attaches to the agent, together with the principal, the responsibility for making the return and the absolute incurrence of liability for the penalties provided for erroneous, false, or fraudulent returns. It is respectfully submitted that the instant case, being one of evasion by means of filing false and fraudulent returns, comes unqualifiedly within the purview of the foregoing regulation.

United States Treasury Department Bureau of Internal Revenue Regulation 111, Section 29.51-2 enumerates further provisions with reference to the form of return when made by an agent:

> United States Treasury Department, Bureau of Internal Revenue Regulation 111, Section 29.51-2:
>
> "* * * Whenever a return is made by an agent it must be accompanied by the prescribed power of attorney, Form 935, except that an agent holding a valid and subsisting general power of attorney authorizing him to represent his principal in making, executing, and filing the income return,

> may submit a certified copy thereof in lieu of the authorization on Form 935. *The taxpayer and his agent, if any, are responsible for the return as made and incur liability for the penalties provided for erroneous, false, or fraudulent returns.*" (Italics added.)

It is respectfully submitted that the record herein and the returns in question are devoid of evidence relative to the appellant's acting either in the capacity of an agent for his wife or the filing by him of the prescribed power of attorney as required by the foregoing section. It is further respectfully submitted that the reiteration in Section 29.51-2 (supra) of the liability of the taxpayer together with his agent for the penalties provided for erroneous, false, or fraudulent returns further substantiates the contention of the appellee upon the issues raised by Specifications of Error Nos. 1 and 2.

It is respectfully submitted that the appellant was accorded ample notice under the pleadings and specifically under the wording of the indictment of the charges against him. In this connection, the appellant by virtue of the denial of the motion to quash was placed on notice and accorded ample time and opportunity to prepare his defense to the charges set forth in the two counts of the indictment. The appellant was further apprised of the charges as detailed in the indictment to the effect that the proceedings at trial would be had upon the indictment without further particularization, in that the appellant filed a motion for a bill of particulars (R. p. 24) which was opposed

by the plaintiff by way of replication. (R. pp. 26-35.) The motion for a bill of particulars was denied. Thus the defendant was apprised by virtue of the denial as a matter of law of, first, the motion to quash, and second, the motion for a bill of particulars, that the charges as enumerated in the indictment were these charges which he was to defend by his plea of not guilty.

The substance of the appellant's Specifications of Error Nos. 1 and 2 is directed to the physical form of the returns in question. It is respectfully submitted that the instant indictment amply apprised the defendant of the charges in two counts of wilfully attempting to evade income taxes for the years 1942 and 1943, and does not charge or purport to refer to any charge, irregularity, deviation or use of official forms other than those required to be used. *Gusik v. United States,* 54 F. (2d) 618.

In the *Gusik* case, one of the points upon appeal was directed to the Court's refusal to admit evidence of the policy of the Internal Revenue Department which, it was alleged, permitted a taxpayer to state his income in a lump sum in lieu of setting forth specifically the various items and sources of such income. In characterizing that evidence as being immaterial, the Court said:

> *Gusik v. United States,* 54 F. (2d) 618, 620:
> "Obviously there was no prejudice in refusing to admit in evidence what in this case was immaterial. The controversy was not one dealing with appellant's failure to particularize the items or

> sources of income. It was whether appellant made a false return as to total income and whether, in so doing, he was guilty of wilfully attempting to defeat and evade his tax."

The appellant in his argument upon Specifications of Error Nos. 1 and 2 adverts briefly to variances in the indictment and proof. It is elementary that in trials involving evasions of income taxes that it is not necessary that the plaintiff prove an evasion of all the taxes charged in the indictment. The proof which is sufficient to convict is that proof which shows any substantial portion of the tax liabilty to have been wilfully evaded. The plaintiff is not required to prove the exact amount of taxes charged as being evaded as laid in the indictment, for the reason that the amount of the tax is not the gist of the offense of violation of Section 145(b), Title 26, United States Code (26 U.S.C.A. 145(b)). Neither is the plaintiff required to prove the exact amount of unreported income of a defendant. Proof of the exact amount of unreported income is not required for the reason that unreported income as such is not the gist of the offense.

> *United States v. Johnson,* 319 U. S. 503, 517:
> "Of course the government did not have to prove the exact amounts of unreported income by Johnson. To require more or more meticulous proof than this record discloses that there were unreported profits from an elaborately concealed illegal business, would be tantamount to holding that skilful concealment is an invincible barrier to proof * * *"

Cooper v. United States, 9 F. (2d) 216, 223:

"Exception is taken to the introduction of photostatic copies of the government documents forming the basis of the prosecution. Photostatic copies of government documents, duly authenticated, are now the accepted instrumentalities of introducing official records. Tax returns are logically public records, and made so by the revenue law. Their filing and preservation are official acts."

Kurzrok v. United States, 1 F. (2d) 209, 211:

"It is assigned as error that the court, over the objection of the defendant, admitted in evidence photostat copies of the accounts made up by Kurzrok for his expenses at the Midland and Park hotels, and the exhibit thereto attached. But those documents, after payment, appear to have been lodged with the Department at Washington, and the photostat copies were certified in accordance with Section 882, Rev. Stats. (Comp. St. § 1494), and Section 306, Act June 10, 1921, 42 Stat. 24 (Comp. St. Ann. Supp. 1923, § 400 4/5 c.)"

It is respectfully submitted that the appellee's argument relative to availability of the original returns and productions thereof has no foundation in law in view of the provisions of 28 U.S.C.A. 661 (supra). It is respectfully submitted that this statutory foundation is conclusive as to the admissibility of the photostatic copies of the returns for the years in question, and does not necessitate or anticipate the laying of a foundation in law for the non-production of the originals. The statute by its very terms abrogates this requirement.

3.

SPECIFICATION OF ERROR NO. 4.

Specification of Error No. 4 is directed at the alleged error of the Trial Court in overruling the objections on behalf of the appellant to the receipt in evidence of Plaintiff's Exhibits "H", "I", "K" and "L", being certain of the books of accounts of the appellant. It is grounded upon the objection that the seizure of the Exhibits was a violation of the constitutional guaranties of the appellant under the Fourth and Fifth Amendments to the Constitution, and that no sufficient showing to establish that the books were turned over voluntarily in the real sense of that word was made. The specification appears to be founded upon dual grounds, first, that the seizure of the books constituted a violation of the appellant's guaranties under the Fourth and Fifth Amendments, and secondly, that no sufficient foundation was laid to establish the voluntary nature of the tender of the Exhibits to the investigating agent. These two objections raise issues which are so identical in nature and foundation in law that the appellee elects to treat them as a single issue.

Examination of the testimony of Clarence Lester Krause, Special Agent of the Bureau of Internal Revenue, Intelligence Unit, a witness on behalf of the plaintiff, establishes the foundation in law for the voluntary tender of the Exhibits to the Agent by the appellant. It is to be noted that the premises in question constituted the business premises of the appellant, and further that the appellant's son, James

Sur, did not participate directly or indirectly in any acquiescence or consent objected to in this Specification of Error No. 4.

The rights of a Revenue Agent of visitation to and entry upon a business premise such as in the instant case is grounded upon Section 3614 (a), Title 26 United States Code. (26 U.S.C.A. 3614 (a).)

> 26 U.S.C.A. 3614 (a):
> "To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

The foregoing statutory provision permits visitation upon premises of a taxpayer and the examination of any books, papers, records or memoranda bearing upon matters required to be included in a tax return by any officer or employee of the Bureau of Internal

Revenue to the end that the correctness of any return may be ascertained. It is respectfully submitted that in view of the foregoing explicit statutory authority the original entry upon the business premises of the appellant by Agent Clarence Lester Krause was a lawful one. This leaves for consideration the circumstances surrounding the tender of the books of accounts (Exhibits "H", "I", "K" and "L", referred to in Specification of Error No. 4) to agent Krause on two occasions, the first tender at the store premises, and the second tender the voluntary production of further records at the office of the Intelligence Unit in Honolulu at the time of the interview of the appellant in that office.

It is respectfully submitted that an examination of the testimony of Clarence Lester Krause, Special Agent of the Bureau of Internal Revenue, Intelligence Unit, a witness in behalf of the plaintiff (R. p. 108-126) unqualifiedly discloses that the tender of Exhibits "H", "I", "K" and "L" by the appellant to Krause was a complete, unqualified, and voluntary tender in every respect.

The witness Krause testified that he first met the appellant on January 27, 1945 about noontime, and that this meeting was occasioned in the discharge of his official duties in conducting an investigation with reference to the taxpayer appellant as to the payment of his income taxes. (R. p. 110.) On this occasion, Agent Krause walked into the furniture store of the appellant at 378 North School Street in Honolulu and inquired for Mr. Sang Soon Sur. The gen-

tleman of whom he made inquiry stated that he was Mr. Sang Soon Sur. (R. p. 111.) Agent Krause then produced his credentials and stated to the appellant that he was with the Bureau of Internal Revenue and that he wished to examine his income tax liability for the years 1942 and 1943. (R. p. 111.) The appellant then stated (in English) that he would like to get in touch with his son, James Sur. Agent Krause told him that was all right. The appellant thereupon telephoned to this son, engaged in a telephonic conversation presumably with him, and upon the conclusion thereof Agent Krause asked the appellant if he would produce all of his records which he had for the years 1942 and 1943 (R. p. 111).) The appellant then informed Agent Krause that he had but one book, a small bound book, for the year 1943, kept in English (R. p. 111).) Agent Krause thereupon asked him if he had any other books for the years 1942 and 1943. The appellant stated that he had none (R. p. 112.) Upon tendering the one book to Agent Krause, he then asked the appellant if he could use or retain this book with reference to the investigation. The defendant replied (in English) that the book could be kept as long as desired for income tax purposes. (R. p. 112.) This book subsequently became Plaintiff's Exhibit "H". (R. p. 114.)

Agent Krause further inquired of the appellant as to whether he had any bank records. The appellant stated that he had one bank account at the Bishop National Bank in Honolulu, a commercial checking account under the name of Wong Bok Sur, which

was his wife's name. (R. p. 115.) Agent Krause then inquired if the appellant had any other bank account. The appellant stated that he had none. Agent Krause inquired if he had a safety deposit box. The appellant stated that he had none. (R. p. 115.) Agent Krause then inquired if he would produce the bank statement and canceled checks if he had them upon the premises. The appellant thereupon looked around the premises, and with appellant's permission, Agent Krause assisted him in making a search for the bank statements. Together, Agent Krause and the appellant found practically all of the bank statements for the years 1942 and 1943. (R. p. 115.) Agent Krause thereupon cursorily examined and totaled the deposits shown on the bank statements submitted by appellant, and discovered that the statements represented sums considerably in excess of the reported business sales of the appellant on his tax returns for the years 1942 and 1943. (R. p. 115.)

Agent Krause then departed the premises, and before leaving made an appointment with the appellant to come to the office of the Intelligence Unit in Honolulu the following Monday, together with his son, and to bring with him all the bank records and any other records that he could find for the years 1942 and 1943. (R. p. 116.) The date of the foregoing original visitation to the business premises of the appellant occurred on Saturday, January 27, 1945.

At approximately 10 o'clock a.m. on January 29, 1945, the appellant in company with a young Korean man whom he identified as his son, James Sur,

appeared at the office of the Intelligence Unit in Honolulu. They had in their possession certain bank statements and checks which Agent Krause had previously examined on the premises and also bank statements and checks of the business for the year 1944. (R. p. 116.) Agent Krause inquired as to whether or not they had any other records for the years 1942 and 1943 and whether or not they were able to find any more. The appellant informed Agent Krause that he had not been able to find any more, and that the one book (the book tendered on the previous Saturday) was all that he had. (R. p. 116.) Agent Krause thereupon sat down to a conference with the appellant and his son, conducting an inquiry and examination into matter pertaining to the returns of the appellant for the years 1942 and 1943. This examination lasted approximately two hours. Another Revenue Agent was present part of this time. (R. p. 116.) Agent Krause's examination pertained to deposits in the appellant's bank account, elaboration of statements contained therein, the activities of the appellant with reference to Tonamoshis. income of his dependents, whether or not the appellant had any unreported sales from his business other than those entered upon his income tax returns, details relative to the appellant's methods of bookkeeping and book entries of sales, and other matters relevant to his returns. (R. pp. 116, 117.) Throughout this examination, the appellant was not very helpful. (R. p. 116.) James Sur, the son of the appellant, was present during the entire time and on occasions when the appellant stated he did not under-

stand the question asked of him in English, his son, James Sur, would act as an interpreter, interpreting the question asked from English into Korean and in turn from Korean into English, reciting the answer to Agent Krause in English. Most of the time, however, the appellant himself answered Agent Krause directly in the English language without benefit of interpreter. (R. p. 118.) After approximately two hours the appellant and his son left the office of the Intelligence Unit after voluntarily submitting the bank statements upon the same basis as the other book, to be kept as long as desired for income tax purposes. (R. p. 118.) Agent Krause in the interim continued to conduct his investigation of the affairs of the appellant as reflected in the returns relative to the years 1942 and 1943.

In furtherance of his examination and investigation and on February 10, 1945 Agent Krause again visited the business premises of the appellant at 378 North School Street, Honolulu, and inquired of him as to certain items reflected upon deposit tags in the bank account. (R. p. 119.) The appellant stated that he could not remember but that he would try to recall and let Agent Krause know later. Agent Krause thereupon inquired of the appellant as to his method of handling cash and cash receipts on the business premises, the appellant stating that he kept his cash on hand in a drawer in a cabinet on the business premises. (R. p. 122.) The appellant thereupon withdrew a paper bag from the cabinet, emptied the contents thereof, and Agent Krause requested that the appellant count the bills therein, which he did. The

bag contained five thousand dollars in currency, the appellant stating that the sum represented Tanamoshi moneys which he had collected. (R. p. 122.) Within the range of visibility and lying on a corner of the desk at which Agent Krause and the appellant sat, were some account books. Agent Krause inquired of the appellant as to what these books of accounts were. The appellant did not reply but tendered the books to Agent Krause, placing them before him. (R. p. 122.) The books, upon examination by Agent Krause, developed to be books of accounts some of which were in the Korean language and some in the English language, covering the years 1942 and 1943. (R. pp. 122, 123.) Agent Krause then inquired as to whether or not Mr. Sur would mind letting the Bureau have these records voluntarily. He replied that he had absolutely no objections. Agent Krause thereupon took the records with him, returned to the Intelligence Unit office, and proceeded to examine them. These books subsequently became Exhibits "I", "J", "K" and "L" of the plaintiff. (R. pp. 127, 128.)

Upon the trial, Agent Krause was asked to state his authority for the investigation of the appellant and testified that it was founded upon Section 3614 of the Internal Revenue Code (26 U.S.C.A. 3614.) (R. p. 126.)

It is respectfully submitted that the foregoing foundation of factual evidence at the trial established beyond question that Plaintiff's Exhibits "H", "I",

"K" and "L" were voluntarily tendered to Agent Krause.

That the constitutional immunity against unreasonable searches and seizures is a personal right which may be waived is well settled. The purpose of the constitutional provision against unreasonable searches and seizures is to protect the citizenry against arbitrary and tyrannical power. A defendant may waive the manner and method of acquisition of his papers or books and thereupon the constitutional objection is removed instanter. The foregoing rules of law it is respectfully submitted are too well settled to require the citation of authorities.

It is respectfully submitted that the consent of the appellant was unequivocal and specific. The appellant, being a taxpayer residing and having his business situs within the Internal Revenue Collection District of Hawaii, is presumed to be familiar with the requirements of taxation laws pertaining to the filing of annual income tax returns; and the visitations of Agent Krause to the premises as detailed above, being for the purpose of examination of matters relevant to the return and expressly limited to these matters were made well known to the appellant.

It is to be noted that only upon rare occasions did the son of the appellant, James Sur, act in the capacity of an interpreter on behalf of his father. There is no dispute of fact but that the appellant was the person in charge of the business premises and the person of whom the constitutional privilege com-

plained of was invoked. It is further to be noted that at no time did the appellant's son, James Sur, either directly or indirectly—or as an asserted agent on behalf of his father—purport to extend or consent to the voluntary tender of the Exhibits in question. All acts in that connection were solely and exclusively those of the appellant. This fact is undisputed.

The case of *United States v. Lustig et al.*, 67 F. Supp. 306, it is submitted, is a recent decision upon the point in question, and sustains the position of the appellee upon the issue raised in Specification of Error No. 4. The defendant moved by notice of motion for an order to suppress certain evidence consisting of papers voluntarily tendered to Internal Revenue Agents at the time of the examination of the books of a corporation, said examination being invited by the taxpayers. The defendants who were officers and employees of the taxpayers had knowledge at the time of the invitation of examination that investigation into the tax liability had been commenced and that it would lead to discovery of fraudulent entries in the taxpayers' books, and to fraudulent income tax returns filed. One of the issues raised was whether or not the books, records and documents were obtained by Government agents in the course of an unreasonable search or seizure, or by force, fraud, stealth, trick, device or improper means. The facts in the *Lustig* case—as they pertain to the instant appeal—were that an Internal Revenue Agent communicated by telephone with one of the defendants,

advising him that he desired to make an investigation of the books of one of the defendants for the purpose of checking tax returns. At this time, the defendants knew that any such investigation would or might disclose the fraudulent practices carried on by the corporation in connection with its income tax returns. The defendant suggested to the Agent in the face of this that an examination be deferred for a time. Several weeks thereafter, Special Agents and Internal Revenue Agents examined the books and records of the defendants and discovered that the defendants had understated the corporate taxpayers' income in substantial amounts.

The Court held that in these circumstances the defendants were neither coerced, compelled, nor induced—either with or without process—to make incriminatory disclosures; and that the examination of the books was invited by the defendants with full knowledge that an investigation had been commenced which would lead to the discovery of fraudulent entries in the books and with full knowledge that said investigation could be commenced and continued with or without the consent of the defendants. The Court further held in its conclusions of law that the corporate records, books and documents of the defendants were not produced as a result of any inducement, even slight, held out to the defendants or the corporate taxpayers by any person in authority or person connected with the Government; nor were the records, books and documents obtained by Government agents in the course of an unreasonable search or seizure,

or by force, fraud, stealth, trick or device or improper means of any kind. Application of Henry Lustig Co., Inc., et al., *United States v. Lustig et al.*, 67 Fed. Supp. 306.

It is respectfully submitted that Plaintiff's Exhibits "H" "I", "K" and "L" were properly admitted in evidence and were voluntarily tendered to the investigating officer.

4.

SPECIFICATION OF ERROR NO. 5.

Specification of Error No. 5 is directed to the alleged error of the trial Court in permitting the plaintiff's witness, Agent Clarence Lester Krause, to testify as to matters which took place in 1945 at the time of the investigation of the appellant.

The investigation of the appellant was commenced by Agent Krause on January 27, 1945. (R. p. 110.) Details covering Agent Krause's initial visitation to the premises and events transpiring thereafter relevant to the issues upon this appeal have heretofore been enumerated and discussed in Specification of Error No. 4. It is assumed for want of particularization of Specification of Error No. 5 that the subject of the specification is directed to certain portions of the testimony of Agent Krause recited in his direct examination (R. pp. 119-122), the pertinent parts thereof being Agent Krause's testimony as to what transpired upon his return to the premises of

the appellant on February 10, 1945. (R. p. 119.) It is noted that Agent Krause's visit on February 10, 1945, and conversations with the appellant at that time were directed to matters concerning the examination and investigation of the appellant relative to his bank account, deposit tags and certain cancelled bank checks discovered by Agent Krause in the course of his investigation. (R. pp. 118, 119.) On this occasion Agent Krause discussed with the appellant amounts and methods of keeping of his current business sales records. (R. p. 119.) Upon this occasion, the appellant disclosed to Agent Krause his current sales records which revealed no entries for two days prior to February 10, 1945. The appellant volunteered that he had been too busy and had not been able as yet to record his sales for the previous two-day period, but was keeping them in his head. (R. p. 119.) Agent Krause then asked the appellant if he would mind showing him the amount of cash which he had on hand representing the sales which the appellant had made on the previous day and not entered in his current sales book. (R. p. 120.) The appellant then voluntarily disclosed his cash on hand in the sum of two or three hundred dollars, stating that the amount was all of the cash that he had on hand on the premises. (R. pp. 121-122.) However, at this time, the defendant further admitted that he had other cash which he kept in a cabinet in the premises—testimony regarding the paper bag and five thousand dollars in currency therein having heretofore also been discussed in the preceding Specification of Error.

The investigation of the appellant with reference to his tax liability was commenced on the examination conducted by Agent Krause at the time of his original visitation to the premises of the appellant on January 21, 1945. The subject of the instant specification raises the relevancy of the testimony of Agent Krause at the trial of events transpiring at the time of his visit on February 10, 1945, approximately twenty days thereafter.

The offense of which the appellant was found guilty is that of wilful evasion of income taxes for the years of 1942 and 1943.

To the rule of law that events of a similar nature and description having no relevancy to criminal acts with which a defendant is charged are not admissible in a criminal trial, there exist well-established exceptions in the field of income tax evasion prosecutions. These exceptions are predicated upon the relevancy of acts, doings, records, documents, methods of operation, performances, conduct of business and all other activities of a taxpayer defendant which will in any way tend to establish a method of operation or a continuing performance of an act or mode of conduct of such nature which tends to establish a fixed mode of operation of a business, or the receipt of unreported or unexplained income by a taxpayer.

Continuance of income during taxable years either prior or subsequent to the years charged in an indictment are admissible in establishing the intent of the taxpayer as they pertain to the charges laid in the indictment, and upon the element of wilfulness

to evade in connection therewith. It is noted that testimony asserted as irrelevant here relates to physical events transpiring upon the premises of the appellant and are not documentary by way of introduction of income tax returns of the appellant for other years, or upon documentary matters for other years which may have been contained in any of his books of accounts.

It is respectfully submitted that the following cases substantiate the position of the appellee in respect of Specification of Error No. 5 in that the verdict of guilty herein covered the years 1942 and 1943 and that the evidence asserted to be irrelevant is in fact relevant upon the issue of intent, and more particularly wilful intent as defined in Section 145 (b), Title 26 United States Code (26 U.S.C.A. 145 (b)) and as disclosing the method of operation of the appellant's business and a continuous mode or method of operation or performance by the appellant in the conduct of his business.

Rose v. United States, 128 F. (2d) 622, 625 (certiorari denied, 63 S. Ct. 47, 317 U.S. 651, 87 L. Ed. 524):

"The income tax returns of appellant for the years 1935 and 1938 were offered in evidence. The only objection interposed to their admission was that they were incompetent, irrelevant, and immaterial. In overruling the objection, the court stated that they were admitted on the theory that they might be material as showing the continuance of the income and conduct. No further

reference was made to such returns throughout the entire trial. The trial concerned itself with transactions involving the giving of bribes in 1936 and 1937. It may be conceded, without deciding, that the returns were not admissible in evidence, and that there was no occasion for the statement of the court. But the guilt of appellant was clearly shown by competent evidence, and it is transparently plain that the introduction of the returns and the statement of the court made in connection therewith were harmless."

United States v. Skidmore, 123 F. (2d) 604, 610 (certiorari denied, 62 S. Ct. 626, 315 U. S. 800, 86 L. Ed. 1201):

"Appellant further contends that the court erred in the following instruction to the jury: 'With respect to the years prior to 1929, it is presumed that the defendant has complied with the provisions of the Internal Revenue Laws and has filed a return and paid his income tax in such of those years when he had a net income subject to tax. Evidence that he did not file a tax return for any of these prior years may therefore be considered by you as an admission by him that he did not have a net income in excess of the amounts for which he would have been required by law to have filed a tax return'. Appellant contends that this instruction constituted reversible error for the reason that he was not charged with any crime for the years prior to 1933. Of course this is true and the court so told the jury in the later instructions. When the instructions are read together it is found that there is no inconsistency in this respect. Moreover, it could

not have prejudiced appellant in any way, for the verdict of guilty covered only the years of 1936, 1937 and 1938."

United States v. Sullivan, 98 F. (2d) 79, 80:

"Although the attempt to evade the tax for a given year is a separate offense from an attempt to evade the tax for a different year; they are clearly crimes 'of the same class.' Moreover, the evidence of intent to evade the tax in one year is competent evidence of intent to evade the tax in a later year. *Emmich v. United States,* 6 Cir., 298 F. 5, 9, certiorari denied 266 U.S. 608, 45 S.Ct. 93, 69 L.Ed. 465; cf. *Harris v. United States,* 2 Cir., 273 F. 785. Indeed the crimes charged in the indictment describe one course of conduct extending over several years, which results in separate offenses simply because the duty to file a return pay the tax is one that recurs every twelve months."

Malone v. United States, 94 F. (2d) 281, 286 (certiorari denied, 58 S. Ct. 944, 304 U. S. 562, 82 L. Ed. 1529):

"Having disposed of the first assignment of error with reference to the abatement plea, we now come to the second assignment, wherein it is claimed the court erred in admitting evidence of tax evasion for the years 1926, 1927, and 1928. It seems, however, that defendant is in no position to raise such question with reference to the two former years for the reason that evidence was not admitted for such purpose. No income tax return for those two years was admitted which, of course, would have been necessary if the government had sought to show an evasion.

There was some evidence with reference to defendant's bank deposits for these years contained in the stenographic transcript of the colloquy which took place between the defendant and the revenue agents, which not only was not objected to by counsel for the defendant, but at his request was admitted and read to the jury. The only other testimony we find relevant to 1926 and 1927, is the testimony of the attorneys heretofore referred to relative to the payment of money to the defendant while chairman of the Tax Commission, and was for the purpose of showing defendant's source of income rather than an evasion of the income tax thereon. As for the year 1928, there was admitted evidence of defendant's currency deposits under the same circumstances as they were made in 1929 and 1930, and that he failed to report such money as income in his return for 1928. The courts have many times held that wilful intent is one of the essential elements in the proof of the crime of evasion of income tax. *Capone v. United States,* 7 Cir., 51 F. 2d 609, 76 A.L.R. 1534; *Oliver v. United States,* 7 Cir., 54 F. 2d 48, 50; *Paschen v. United States,* 7 Cir., 70 F. 2d 491, 498."

Emmich v. United States, 298 Fed. 5, 9 (certiorari denied, 45 Supreme Court 93, 266 U. S. 608, 69 L. Ed. 465):

"It is claimed the trial court erred in admitting evidence of the failure of defendant to file a tax return for 1920, and evidence of his occupation, income, and expenditures during that year. The second count in the indictment, on which the defendant was convicted, charges him with

'knowingly, willfully, and feloniously attempting to defeat and evade the tax imposed by the Revenue Act of 1921,' by knowingly, willfully, and feloniously making a return of income far less than the amount of which he was actually the recipient. It is undoubtedly the rule that, in a trial for one offense, evidence of other and distinct offenses is inadmissible, subject, however, to this exception: That, if intent or motive be one of the elements of the crime charged, evidence of other like conduct by the defendant at or near the time charged is admissible. Both rule and exception have been so frequently stated that it is not thought necessary to cite authority, further than to call attention to the case of *Shea v. United States,* 236 Fed. 97, 149 C.C.A. 307, decided by this court, and *Harris v. United States* (C.C.A.) 273 Fed. 785, wherein some of the more recent cases are cited."

It is respectfully submitted that in addition to the foregoing authorities, the case of *Spies v. United States,* 317 U.S. 492 (decided January 11, 1943) is supporting authority of the strongest nature upon the issue of relevancy of the testimony in question as based upon the element of wilful intent. Wilful intent is an essential element of the offense of which the appellant was charged under the indictment. The petitioner in the *Spies* case was convicted of attempting to defeat and evade income taxes in violation of Section 145 (b), Title 26, U. S. Code (26 U.S.C.A. 145 (b)). In commenting upon the intent and the wilful aspect of the offense charged in the indictment, the Supreme Court at page 498 states:

". . . But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer . . ."

and at page 499:

"Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

"In this case there are several items of evidence apart from the default in filing the return and

> paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records . . ."

It is respectfully submitted that the testimony of Agent Krause upon matters relevant to the investigation and examination of the appellant occurring during the course of the investigation in the year 1945 was relevant and material.

5.

SPECIFICATION OF ERROR NO. 6.

Specification of Error No. 6 is directed to the overruling of the objections of the appellant to the receipt in evidence of its Exhibits "M", "N" and "O", Exhibits "M", "N" and "O" being statements taken upon the examination of the appellant, for the reason that the plaintiff failed to establish that the statements were the voluntary act of the appellant.

During the course of the examination by Agent Krause of the books, papers and records of the appellant upon the matters required to be included in his return, three statements or interviews had between the appellant and Agent Krause touching upon the examination were reduced to documentary form.

The first of these statements was taken by Agent Krause on February 12, 1945 (R. p. 156) and signed by the appellant five days later, on February 17, 1945. (R. p. 171.) This statement subsequently became Plaintiff's Exhibit "M" of the instant specification. (R. p. 186.) The second statement was taken on February 12, 1945 and signed on the same date. (R. pp. 186-187.) This statement subsequently became Plaintiff's Exhibit "N" in the instant specification. (R. p. 192.) The third statement was taken and signed on February 17, 1945. (R. p. 192.) This statement subsequently became Plaintiff's Exhibit "O" in the instant specification. (R. p. 201.)

Inasmuch as the appellant in Specification of Error No. 6 has elected to combine the alleged errors in respect of Plaintiff's Exhibits "M", "N" and "O" in one specification, the appellee will treat the combined exhibits accordingly, with two qualifications:

First: Contending that none of the said exhibits are in fact confessions of the appellant, but merely the reduction to writing of the appellant's statement had at the respective instances of the examination of his books, papers and records upon the matters required to be included in his return and constituting the appellant's explanation and amplification of the contents of his books and records, mode of conduct of his business and the manner and method of the keeping of his records.

Secondly: That Plaintiff's Exhibit "M", being taken and transcribed on February 12, 1945, and

signed five days later by the appellant does not, in any manner, due to the five-day lapse of time between the examination and the signing, constitute a confession in law of the appellant. Categorically, the appellee denies that any of Plaintiff's Exhibits "M", "N" and "O" are confessions, or that the law relative to foundation or admissibly applicable to confessions are applicable thereto.

To the end, however, that the issue raised by appellant in Specification of Error No. 6 may be met, the following factual circumstances surrounding the three exhibits are herewith chronologically referred to: Plaintiff's Exhibits "M", "N" and "O".

Agent Krause testified that he took three statements from the appellant. The first statement was taken on February 12, 1945, at the office of the Intelligence Unit in Honolulu in the afternoon of that day. (R. p. 156.) Present were Agent Krause, the appellant, the appellant's son, James Sur, who acted as interpreter when needed, and a stenographer, Miss Irene Hildreth, an employee of the Intelligence Unit.

The second statement was taken in the form of an affidavit shortly after the first statement and was taken and signed on February 12, 1945 at the office of the Intelligence Unit in Honolulu. On that occasion Agent Krause and the appellant together with his son, James Sur, in the capacity of interpreter, were present. (R. p. 156.)

The third statement was taken on February 17, 1945, five days later, at the office of the Intelligence

Unit in Honolulu. (R. p. 157.) Present were Agent Krause, the appellant, his son, James Sur, in the capacity of interpreter, and a stenographic employee of the Intelligence Unit, Miss Gladys M. Callaway. (R. pp. 157-158.)

Plaintiff's Exhibit "M"

Upon the taking of the first statement, the appellant's son was present during the entire period, acting in the capacity of an interpreter, interpreting from the English language to the Korean language and from Korean to English. (R. p. 157.) The appellant's son, James Sur, acted as interpreter for his father where needed. This for the reason that the appellant at times would speak in the English language to Agent Krause, and at other times he would speak through his son, James Sur, in the Korean language. Agent Krause was able to understand the English spoken by the appellant, which English is designated locally as "extended English or pidgin English". (R. p. 157.) The appellant's son, James Sur, spoke in good English. (R. p. 158.) The oath was administered by Agent Krause to the appellant prior to the taking of his statement, the oath being interpreted to the appellant by his son. (R. p. 158.) Agent Krause inquired as to whether or not the appellant understood he was appearing voluntarily before him. The appellant stated that he so understood. (R. p. 158.) Agent Krause admonished the appellant as to his constitutional rights against incriminating himself, and in this connection asked the appellant whether he understood he had the right under the Federal Constitution to refuse

to answer any questions asked him that would incriminate him under the federal law. (R. p. 159.) Agent Krause did not offer the appellee any reward or immunity of any nature whatsoever. (R. p. 159.) Agent Krause informed the appellant that the information he was about to give could be used against him at a later date. (R. p. 159.) Agent Krause had theretofore, on February 10, 1947, made an appointment with the appellant to come to the office of the Intelligence Unit in Honolulu for the purpose of giving a sworn statement. (R. p. 161.) On this occasion, on February 10, 1947, Agent Krause inquired as to whether or not appellant would care to come in and make a sworn statement, to which appellant replied that he would be agreeable. (R. p. 161.) At the time of the taking of the statement, there were present in addition to Agent Krause, the appellant, the appellant's son, James Sur, and Miss Hildreth. (R. p. 161.) Miss Hildreth in her capacity as an employee of the Internal Revenue Bureau recorded the questions and answers in shorthand form. (R. p. 162.)

James Sur, son of the appellant, testified that before the signing of the first statement Agent Krause advised the appellant of his constitutional rights, and of the fact that the statement could be used against him. (R. p. 167.)

Agent Krause testified that Exhibit "M" was taken on February 12, 1945, and signed five days later on February 17, 1945, and that between those dates it was being transcribed. (R. p. 171.)

Inasmuch as appellant concedes that no physical compulsion was exercised in connection with the taking of any of the exhibits in question, that aspect of the issue involved in the instant specification will not be discussed. (R. p. 171.)

Agent Krause presented the first transcribed statement—Plaintiff's Exhibit "M"—to the appellant and advised both the appellant and his son to read it, requesting the appellant's son to interpret the statement to the appellant. (R. p. 173.) This he did.

The Court, making Agent Krause its own witness, asked him if he had employed any persuasive methods upon the appellant in taking the statement or in inducing him to sign it. Agent Krause stated that he had not. (R. p. 175.) The Court also inquired as to the purpose of having the statement sworn to. Agent Krause testified that this was accomplished as a part of the officially prescribed procedure in making tax investigations and that he administered the oath under the authority conferred upon him by statutory law—Section 3614 of the Internal Revenue Code. (R. p. 175.) Miss Irene A. Hildreth, an employee of the Office of the Internal Revenue Agent in Charge, Honolulu, transcribed the statement, Plaintiff's Exhibit "M", in her capacity as a stenographer. (R. p. 177.) She testified that the appellant's son, James Sur, was present at the time of the taking of the statement, acting in the capacity of interpreter for the taxpayer appellant, and that she reduced to shorthand dictation the questions and answers constituting the statement—Plaintiff's Exhibit "M". (R. p. 178.)

Agent Krause identified the signature "Sang Soon Sur" written in ink upon the last page of Plaintiff's Exhibit "M" as that of the appellant and testified that he witnessed the appellant affix his signature thereto on February 17, 1945. (R. p. 183.) Agent Krause identified the certification by the interpreter, James Sur, which certification was also signed in Agent Krause's presence. (R. p. 183.) Agent Krause further identified the initials "S.S.S." appearing on pages one to sixteen inclusive of Plaintiff's Exhibit "M" at the bottom of each page thereof being the initials of Sang Soon Sur which the appellant affixed thereon in Agent Krause's presence. (R. pp. 183, 184.)

Plaintiff's Exhibit "N"

Plaintiff's Exhibit "N" is an affidavit of the appellant, signed by him and certified to by the appellant's son, James Sunai Sur, as witness and interpreter for his father. Agent Krause testified that prior to the signing thereof he stated to the appellant that he was not required to sign it under the Constitution of the United States (R. p. 187); and further, he stated to the appellant that it could possibly be used against him at a later date. (R. p. 187.) Agent Krause admonished the appellant as to his right of refusal to answer, and thereupon administered the oath to the appellant. (R. p. 187.) Plaintiff's Exhibit "N" was signed approximately one-half hour after the taking of the first statement—Plaintiff's Exhibit "M". Exhibit "N" was made out in the handwriting of Agent Krause in lieu of the usual procedure of stenographic notes and transcription thereof, for the reason that

there was no stenographer available at the time, it being 5:30 o'clock p.m. (R. p. 188.) This exhibit was also translated to the appellant by his son, James Sunai Sur, prior to the signing thereof. (R. p. 188.)

Plaintiff's Exhibit "O"

Plaintiff's Exhibit "O" was taken on February 17, 1945, in the office of the Intelligence Unit in Honolulu and signed on the same date. (R. p. 192.) Present at that time were Agent Krause, the appellant, his son in the capacity of interpreter, and Miss Gladys Callaway. (R. p. 193.) Agent Krause admonished the appellant as to his constitutional rights prior to the taking of the statement (R. p. 193), and stated to him that he was not required to testify against himself and that anything he said or any information given could be used against him later in any subsequent proceeding. (R. p. 193.) Agent Krause inquired as to whether or not the appellant was appearing voluntarily in connection with his income tax liability, to which the appellant replied that he was. (R. p. 193.) Agent Krause identified his signature upon Plaintiff's Exhibit "O", the oath thereon, and the signature of Sang Soon Sur upon the exhibit. (R. p. 196.) Agent Krause further testified that he witnessed Sang Soon Sur, the appellant, signing the statement, and further identified the signature of James S. Sur as interpreter thereon (R. p. 196), and the initials "SSS" on pages one and two as being the initials of the appellant. (R. pp. 196, 197.)

Gladys M. Callaway, clerk-stenographer employee of the office of the Intelligence Unit, acted as stenog-

rapher in the taking of this exhibit. (R. p. 197.) She testified that there were present at that time Agent Krause, the appellant, James Sur, acting as interpreter for the appellant, and herself, she being summoned to the conference room for the purpose of taking the statement of the appellant. (R. pp. 199-200.) It is respectfully submitted that the plaintiff, in the circumstances, has more than amply met and fulfilled the foundational requirements for admission of the foregoing exhibits as reflected by the foregoing portions of the record herein.

The statutory authority for the examination of the appellant, the subject of Specification of Error No. 6, rests in Section 3614, Title 26, United States Code (26 U.S.C.A. 3614):

> "(a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

It is respectfully submitted that the three separate statements do not in any degree alter the validity and voluntary aspect of the issues of law or fact raised in this specification. This Court will judicially note that matters pertaining to income taxes and more particularly to investigations concerning the evasion thereof, are in themselves and by their very nature matters of great complexity requiring diligent and conscientious effort on the part of an investigating agency and agents together with consumption of indefinite time in arriving at a finding or conclusion based upon examination of either books of accounts or by way of interview to determine whether or not a taxpayer has included in a return all matters required to be included therein. This is true if it pertains to either a civil or criminal investigation and the attending liabilities relative to each. The instant case being one of criminal liability, in itself warrants the persistency and intelligent investigating of the affairs of the appellant taxpayer as conducted by Agent Krause. Otherwise, it is submitted, Agent Krause would have become derelict in the discharge of his duties.

The appellant by way of numerous reference in appellant's brief, is characterized as an alien lacking in understanding of the English language. It is also urged in a reference therein that the appellant, living in the Territory of Hawaii which had recently "come through a period of martial law" was "presumed to be terrified out of his wits" by the mere appearance of a federal agent. It is respectfully sub-

mitted that the nationality status of a taxpayer bears no relevancy to his liability as such, either civil or criminal. Further, the appellant had been a resident of the Territory of Hawaii for a great number of years and it is reasonable to assume, having been in business during that period of time, that he had familiarized himself with current American business methods and procedure and more particularly those requirements thereof pertaining to the payment of business and personal taxes. Appellee considers this reference to martial law as abhorrent and having no relevancy to these proceedings, any testimony herein, or being of any materiality whatsoever upon the issue raised in the instant specification.

It is respectfully submitted that ignorance of a taxpayer relative to matters contained in a tax return, or of the subject of an interview or examination relative to the return is solely a question of fact. That a taxpayer may not escape the payment of just taxes or the attending liability of either civil or criminal responsibility attaching hereto by an assertion of ignorance of the law or the requirements in connection therewith is well settled.

The case of *Cooper v. United States,* 9 F. (2d) 216, 222, cogently states the rule:

> "But it is claimed that knowledge on the part of the defendants of the contents of the returns is not shown; that they may have been made up by employees, without personal knowledge on the part of the Coopers. It was shown that defendants were the sole owners of the corporate stock.

> The corporation was a family affair. They were in sole and entire charge of the business; upon them was enjoined the duty of making these returns under oath. The owner of a business need not be the actual bookkeeper, to be familiar with the affairs and finances of that business. It would present a somewhat startling situation if a taxpayer, charged by law with this duty, could sign and file a false return, made to defraud the government, and escape punishment by disclaiming knowledge of that which he has sponsored. Of course, he would not be liable for innocent clerical mistakes; but he must be held to know that which it is his duty to know, and which he solemnly promulgates."

In the circumstances the appellee does not consider that further discussion of this phase is necessary or warranted.

The appellee does not dispute that this Honorable Court may, in independent manner, determine as to whether or not Plaintiff's Exhibits "M", "N" and "O" were the voluntary act of the appellant herein. In the circumstances however, and preliminary to this concession, the appellee respectfully submits that the exhibits, while self-incriminating in nature, are not in the nature of confessions which would categorically require that the legal tests of voluntariness apply. The exhibits are the reduction to writing of the examination of a taxpayer by a duly authorized Revenue Agent of the Treasury Department upon a matter within the sphere of his official duties. The fact that the exhibits are signed, witnessed, and attested under oath does not

in itself constitute the exhibits as confessions in that sense of the word. It is noted that the appellant refers to Exhibits "M", "N" and "O" as statements self-incriminating in nature and as being virtually confessions. It is respectfully submitted that the exhibits are not in the nature of confessions and that therefore the test of legal sufficiency of the exhibits as constituting the voluntary act of the appellant is not in issue in the instant appeal.

It is respectfully submitted that there being three separate reductions to writing of interviews and statements had with the appellant herein, does not in any manner affect the validity or admissibility of any of the exhibits in question, nor the requirements in law relative to the establishment of their voluntariness. The law upon this is well settled.

> *Thomas v. United States,* 15 F. (2d) 958, 960:
>
> "The special agent who, as he claims, took the defendant's written statement which was offered in evidence, testified to the conversation between himself and the defendant on that occasion. It is assigned as error that the court refused to withdraw from the jury the testimony of the agent after it was discovered the defendant had made a written statement; also that the court erred in permitting the introduction of the written statement, and in overruling defendant's motion to exclude the written statement and in permitting the witness to testify that the written statement of defendant was a voluntary statement. As to the last point, it is sufficient to say that the agent, in both direct and cross-examination, told in great

> detail the interview between him and the defendant at the time the written statement was made, and there could have been no possible prejudice arising from the statement objected to. The other points are obviously without merit. A confession or statement of incriminating facts is always competent and may be shown to have been made in writing or orally, or part in writing and part orally, or both in writing and orally, on one occasion or on different occasions."

It is to be noted that the record herein, and particularly with reference to the testimony of Agent Krause, is replete with reiteration of the subject matters of the interviews had by Agent Krause with the appellant to such a degree that the appellee does not consider the quotation of excerpts therefrom as warranted.

Appellant lays great stress upon the case of *Ashcraft v. Tennessee,* 322 U. S. 143, as authority for the contention that the statements were not voluntarily made. The appellee has no dispute with the basic holding of law as enunciated in the *Ashcraft* case under the facts presented therein. An examination of the facts in the *Ashcraft* case however, will disclose that the facts in that case are so grossly and factually distinguishable from those in the instant case that it is not dispositive of the issue raised herein.

One Ware was found guilty of the charge of murder of Ashcraft's wife. Ashcraft, husband of the deceased, was tried jointly with Ware and convicted as an accessory before the fact. Both were sentenced to

ninety-nine years in the state penitentiary. In applying to the Supreme Court for certiorari, the petitioners urged that alleged confessions were used at their trial which had been extorted from them by state law enforcement officers in violation of the Fourteenth Amendment, and that they had been convicted solely and alone on the basis of these confessions. The issue raised was whether or not the petitioners' confessions were in fact freely and voluntarily made. The facts surrounding the statement of Ashcraft disclose that Ashcraft, a man of excellent reputation in the community, was first interviewed by investigative officers at about 6 o'clock p.m. on the day of his wife's murder as he was returning home from work. Informed by the officer of the tragedy, he was taken to an undertaking establishment to identify his wife's body. From there, he was taken to the county jail, where he conferred with the officers until about 2 o'clock a.m. This initial conference was of approximately eight hours' duration. No clues of ultimate value came from the conference. During the following week, the officers had further conferences with Ashcraft on several occasions, but no tangible evidence pointing to the identity of the murderer was forthcoming.

In the early evening of June fourteenth, the officers again came to Ashcraft's home and took him into custody. They thereupon took him to a room on the fifth floor of the county jail. The room was equipped with numerous items of crime detection paraphernalia, such as a finger-printing outfit, cameras, highpowered

lights, and such other devices as might be found in a homicide investigating office. The officers placed Ashcraft at a table in this room with a light over his head, and began to quiz him. The officers questioned Ashcraft in relays until the following Monday morning at approximately 9:30 or 10:00 o'clock. Ashcraft did not leave the room from Saturday evening at 7 o'clock until Monday morning at 9:30 or 10 o'clock, his detention incommunicado therefore being for a period exceeding two nights and one day. The grilling of Ashcraft was directed at him on the assumption that he was the murderer. In the interim, Ware having made an incriminating statement, this statement was read to Ashcraft at approximately 6 o'clock a.m. on Monday morning, and at approximately 9:30 a.m. Monday morning, Ashcraft's answering statement was read to him. Upon this phase of voluntariness of Ashcraft's statement, the Supreme Court of the United States states at page 153:

> "Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all. Ashcraft, a citizen of excellent reputation was taken into custody by police officers. Ten days' examination of the Ashcraft's maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associates likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced

investigators, and highly trained lawyers questioned him without respite. From the beginning of the questioning at 7 o'clock on Saturday evening until 6 o'clock on Monday morning Ashcraft denied that he had anything to do with the murder of his wife. And at a hearing before a magistrate about 8:30 Monday morning Ashcraft pleaded not guilty to the charge of murder which the officers had sought to make him confess during the previous thirty-six hours."

Further, the Court at page 154 in characterizing the situation to be inherently coercive, states:

"We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary confession'."

It is respectfully submitted that the facts in the *Ashcraft* case and in the instant appeal differ in such material respect that there can be no reasonable comparison upon the question of compulsion or voluntariness between the two. Ashcraft was a suspect together with others. In the instant appeal, the appellant was the sole subject of investigation, as a taxpayer, his wife not being a party to any phase of the

criminal proceedings. The time of detention in the *Ashcraft* case varies to such a great extent from the instant case that, it is respectfully submitted, the time element cannot be considered. The petitioner Ashcraft was held incommunicado on the fifth floor of a county jail in a room which by its very nature indicated that its use was that of prolonged and determined *loci* of questioning in cases of homicide investigation. Ashcraft was placed at a table with a light over his head and became the subject of quizzing. This quizzing was accomplished in relays by the enforcement officers for extended periods of time over a period of two nights and a day and portion of a morning. It is respectfully submitted that in the factual circumstances of the *Ashcraft* case the appellee—by way of reiteration in those circumstances not disputing the holding therein—again respectfully submits that upon the factual differentiation alone between the two cases that the facts in the instant appeal are not analogous in any degree to those of the *Ashcraft* case.

It is too well settled to require the citation of authorities that a confession—assuming Plaintiff's Exhibits "M", "N" and "O" in the instant appeal to be such—which is not voluntarily made is not admissible. In the instant appeal, the interviews reduced to writing were the representations of the appellant upon matters contained in his return, and, it is submitted, voluntarily tendered as evidence as disclosed by the chronological events set forth herein (supra).

It is respectfully submitted that, in addition to any self-incriminating statements contained in Plaintiff's Exhibits "M", "N" and "O" the record in this matter is replete with testimony and documentary evidence which amply corroborates and proves all elements of the offense charged herein, sufficient in nature to warrant the conviction of the appellant in the trial Court in addition to the exhibits in question. This being so, it is submitted that in this Honorable Court's independent consideration of the issue raised in the instant specification upon the voluntariness of Plaintiff's Exhibits "M", "N" and "O" that any incriminating statements contained therein are thereby rendered nonprejudicial insofar as proof of the plaintiff's case is concerned relative to the essential elements of the offense charged. It is respectfully submitted that this alternative consideration in itself sustains the theory of the appellee upon the intent specification and upholds its contention that Plaintiff's Exhibits "M", "N" and "O" were in fact voluntarily made, were the subject of proper foundation at the time of trial—assuming the exhibits to constitute confessions—and are nonprejudicial by their very nature in view of the corroborative evidence of record.

6.

SPECIFICATION OF ERROR NO. 7.

Specification of Error No. 7 is directed at the alleged error of the trial Court in overruling appellant's motion to strike certain questions and answers in Plaintiff's Exhibit "M".

By way of completion of the record relative to the alleged error raised by Specification of Error No. 7, the appellee adverts to a further question asked of the taxpayer at the time of the original interview. (R. p. 235):

"Q. Did you plead guilty?

A. Pleaded guilty."

It is respectfully submitted that the foregoing addition completes the relevant representations made by the taxpayer upon the issue in question.

It is noted at the outset that the issue raised by the instant Specification of Error, No. 7, is directed to certain brief questions and answers which constitute a portion of Plaintiff's Exhibit "M", said exhibit being the sworn statement of the appellant taken at the time of his interview by Agent Krause. The questions and answers constitute inquiry into the prior criminal activities, if any, of the appellant. It is respectfully submitted that the questions and answers being by way of examination of the taxpayer-appellant and the examination being subsequently reduced to a writing, that the rules of law in respect of cross-examination of a witness or of a defendant who testifies in his own behalf, do not apply to the

issues raised in this specification. However, by way of answer to the claim of alleged error in respect of that portion of the appellant's statement complained of, appellee respectfully submits that the overruling of the motion to strike was not error.

It is respectfully submitted that every element of the offense charged in the indictment was proved beyond reasonable doubt by the evidence in the Court below. The record on appeal amply supports this.

The error alleged is relative to prior convictions of the appellant, queries as to which the appellant readily answered. It is to be noted that appellant's prior criminal convictions consisted of minor violations save and except a conviction involving narcotics for which the defendant was sentenced to pay a fine of one hundred dollars and given a five-year suspended sentence. The convictions in themselves, save and except the narcotics conviction, are not of such magnitude, it is respectfully submitted, as would sway the deliberation or conscience of a jury in arriving at a determination of guilt or innocence upon trial. It is only glaring and obviously harmful error resulting in miscarriage of justice, which warrants reversal.

Substantial and prejudicial error must not only be alleged but must be proven. To constitute substantial prejudicial error warranting reversal, the entire record of proceedings must be scrutinized to determine the extent or degree of miscarriage of justice or the substantial aspect of any alleged error. If these factors are present, they must, in addition to the fore-

going result in the denial of a fair trial to the defendant. No reversal may be had for alleged error in the admission of evidence which is clearly not prejudicial, although the evidence in itself may be irrelevant or immaterial. It is respectfully submitted that the following cases substantiate the contention of the appellee with reference to Specification of error No. 7:

Berger v. United States, 295 U.S. 78, 81:

"Section 269 of the Judicial Code, as amended (28 U.S.C. §391) provides:

" 'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' "

* * * * * * *

"Evidently Congress intended by the amendment to §269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See *Haywood v. United States,* 268 Fed. 795, 798; *Rich v. United States,* 271 Fed. 566, 569-570."

Myers et al. v. United States, 223 Fed. 919, 925:

"This particular fraud was not only proved, but was proved in such a way that no help was needed from the instances of other false statements with which the record is filled. It was proved by

Defendant's own circulars, by their signed letters, by their admissions on the stand, by their counsel's admissions on the trial, and, indeed practically in this court, because nowhere in the brief of 115 pages is there a single suggestion that they did not unload their own personal holdings on persons whom they induced to believe that they were purchasing treasury stock. With this controlling fact clearly established, it is idle to discuss whether any other misleading representations were or were not made, or what the prospects of the various properties were, or whether some particular bit of evidence might induce a belief that defendants were unprincipled men. Irrespective of all the other testimony, and with the conceded facts before them as to sale of stock falsely alleged to be 'treasury stock', the jury would be bound to find that defendants had devised a scheme to defraud, if they were intelligent and conscientious . . .

* * * * * * * *

". . . Every element of the statutory offense had been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal."

Baish v. United States, 90 F. (2d) 988, 991:

"Without deciding whether the questions were proper, it is enough to say that there is nothing in the record to indicate remotely that they were propounded with deliberate or preconceived impropriety or in bad faith; and it is manifest that the rights of appellant were not prejudiced. A conviction will not be disturbed where the whole record fails to disclose substantial prejudice. *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314."

Salerno v. United States, 61 F. (2d) 419, 424:

" . . . Since the enactment of section 391, Title 28, U.S.C.A., an error is not, however, presumed to be prejudicial. The burden of showing prejudice is upon the appellant, and he is not entitled to the reversal of a judgment of conviction, unless it appears that he was denied some substantial right and thereby prevented from having a fair trial. *Rich v. United States* (C.C.A. 8) 271 F. 566; *Trope v. United States* (C.C.A. 8) 276 F. 348; *Hall v. United States* (C.C.A. 8) 277 F. 19; *Horning v. District of Columbia,* 254 U. S. 135, 41 S. Ct. 53, 65 L.Ed. 185; *Hermansky v. United States* (C.C.A. 8) 7 F. (2d) 458, 460; *Furlong v. United States* (C.C.A. 8) 10 F. (2d) 492; *Miller v. United States* (C.C.A. 8) 21 F. (2d) 32."

* * * * * * * *

"In *Apt v. United States,* 13 F. (2d) 126, 127, this court, after having severely criticized the method of the United States Attorney in cross-examining the defendant, said:

" 'If it were probable the cross-examination had prejudiced the jury against the defendant to the extent of influencing their verdict, it would be the duty of the court to reverse the verdict in the interest of justice. But this cross-examination, though improper, could not have been prejudicial. The connection of the defendant Apt with the conspiracy charged in the indictment was so clearly shown, and the verdict of the jury such a righteous one, that it would be a miscarriage of justice to reverse it on account of this indefensible cross-examination.' See, also, *Hall v. United States* (C.C.A. 8) supra, and *Miller v. United States* (C.C.A. 8) supra.

> "In view of the abundance of competent evidence in this case to justify the conviction of McDonald, and in view of the conviction of Caniglia and Salerno upon virtually the same evidence, we have reached the conclusion that we would not be justified in holding that the improper cross-examination of McDonald deprived him of a fair trial or constituted reversible error."

That a judgment of conviction in a criminal case will not be reversed because of the admission of evidence which was clearly not prejudicial to a defendant, although it may have been irrelevant or immaterial, is well established.

Sawyer v. U. S., 26 S. Ct. 575, 202 U.S. 150;

Dimmick v. U. S., 116 F. 825, 54 C.C.A. 329, affirming, D. C. 1901, *U. S. v. Dimmick,* 112 F. 350, and certiorari denied, 1903, *Dimmick v. U. S.,* 23 S. Ct. 850, 189 U.S. 509, 47 L.Ed. 923;

Miller v. U. S., 4 F. 2d 228, certiorari denied 45 S. Ct. 511, 268 U.S. 692, 69 L.Ed. 1160;

Brown v. U. S., 142 F. 1, 73 C.C.A. 187;

Thompson v. U. S., 144 F. 14, 75 C.C.A. 172;

Tubs v. U. S., 105 F. 59, 44 C.C.A. 357.

It is respectfully submitted that the foregoing authorities sustain the applicable law in respect of the issues raised in Specification of Error No. 7 and that the overruling of the appellant's motion to strike that portion of the statement complained of was not error.

7.

SPECIFICATION OF ERROR NO. 8.

Specification of Error No. 8 urges error in the giving of the United States Instruction No. 6 as modified.

Inasmuch as United States Instruction No. 6, save and except the first portion thereof, which portion is merely preliminary in nature, is a restatement of Section 29.51-2 of Regulation 111 of the Bureau of Internal Revenue, United States Treasury, having the force and effect of law, and in further view of the discussion and contention of the appellee with respect of the law governing the form of return discussed in sub-paragraph 1 of the argument covering Specification of Error No. 1 and Specification of Error No. 2 herein and of the characterization by the appellee that the points of law raised herein are the same involved under Specification of Error Nos. 1 and 2, the appellee rests upon the argument, contentions and authority cited in subparagraph 1 of this, his argument, in reply and answer to Specification of Error No. 8. The appellee in answer to Specification of Error No. 8 reiterates all argument and points and authorities cited in Subparagraph 1 of this, its Argument.

8.

SPECIFICATION OF ERROR NO. 9.

Specification of Error No. 9 alleges error in the giving of United States Instruction No. 19.

United States Instruction No. 19 is a statement of the law of the Territory of Hawaii relative to Tanamoshis. (R. p. 84.) Tanamoshis are joint ventures or enterprises of a financial nature peculiar to certain Oriental races within the Territory of Hawaii. The appellee knows of no other geographical area wherein Tanamoshis are engaged in. Tanamoshis were introduced in Hawaii after the influx into the Territory of large numbers of members of these Oriental races. It is not even generally known within the Territory of Hawaii what the precise terms of a Tanamoshi are, or whether all Tanamoshis are alike in all of their terms. Insofar as the law of contracts or contractual obligations pertains or governs them, the terms of one may not be the same as the terms of another, and for this reason the courts cannot take judicial notice of the terms of such enterprises or contracts.

Briefly, a Tanamoshi constitutes a joint enterprise or venture in which an agreed sum of money is paid into the hands of a promoter or "boss" of the Tanamoshi, to the end that the total thereof may be loaned to any member—save and except the "boss" —at a rate of interest agreed upon. At such time as sufficient contributors indicate a willingness to enter into and form a Tanamoshi, each member thereupon orally obligates himself to pay a stipulated sum

toward the total sum for a stipulated number of months. The promoter or Tanamoshi "boss" as a rule has the privilege of receiving the money contributed at the first meeting without bidding therefor or without paying any commissions, interest or premium thereon. At each successive monthly meeting, each member contributes the stipulated sum, which sum is loaned to the contributing member who bids the highest amount of interest to be paid for the loan. The interest rate therefore, is a flexible one, depending upon the desirability of a member attempting to secure the loan and is limited only by the percentage of interest which the successful bidder bids in the sum. Accessibility of the sum by way of a loan can be a great convenience to the highest bidder, while at the same time each and every member of the Tanamoshi over the stipulated period of time, repays the amount of his loan and as an eventuality pays merely the interest thereon at the rate of his successful bid.

Whether or not Tanamoshi enterprises are in fact loans or joint contributions in the nature of loans is immaterial for purposes of the instant appeal. Ten individual witnesses on behalf of the appellee testified at the trial relative to alleged Tanamoshis or loans to, by, or with the appellant. The record discloses that one of the defenses of the appellant upon trial was that moneys held by him and which were not reported nor referred to in the income tax returns for the years in question were Tanamoshi moneys. The testi-

mony of the ten witnesses in behalf of the appellant was obviously calculated to establish that any Tanamoshi moneys held or in possessission of the appellant were realizations by way of capital and not income.

A brief reference to the testimony of the ten witnesses introduced for this purpose in behalf of the appellant—omitting preliminaries and identification—reflects the following:

Witness: Myung Woo Lee:

That the witness had financial dealings with the defendant in 1942, and that the financial dealing was Tanamoshis in the amount of $1,150.00. (R. p. 320.)

Witness: Duk Bong Park:

That the witness in 1942 had financial dealings with the appellant by way of giving him $330.00 in a Tanamoshi, and in 1943 the witness gave him $760.00 by way of Tanamoshi moneys. (R. p. 320.)

Witness: Hyeng Goo Kim:

That the witness had financial dealings with the appellant in 1942 in a Tanamoshi case in which he took out $900.00. In 1943, the witness had dealings with the appellant in the sum of $2,200.00 (R. p. 322.)

Witness: Young Soon Lee:

That the witness loaned the appellant $1,150.00 in 1942. (R. p. 323.)

Witness: Kyung Ai Cho:

That the witness loaned or gave the appellant $1,600.00 in 1942 and loaned him $1,250.00 in 1943 as Tanamoshi loans. (R. p. 324.)

Witness: Mary Chung:

That the witness loaned the appellant $1,050.00 in 1943 as a Tanamoshi loan. (R. p. 325.)

Witness: Arthur S. Tai:

That the witness loaned the appellant $1,000.00 in 1943 but the same was not a Tanamoshi loan. The loan was a personal one. (R. p. 326.) No security or collateral for the loan was taken by the witness, nor promissory note or other document executed. (R. p. 327.) The appellant was to repay the amount in a lump sum four or five months after the loan. (R. p. 328.) The loan was not a Tanamoshi loan. (R. p. 329.)

Witness: Chin Kan Yue:

The witness gave the appellant $1,000.00 in 1943 which was a loan and not upon the Tanamoshi basis. (R. p. 330.) This loan was repaid to the witness the same year and was not a Tanamoshi loan in nature. (R. p. 331.)

Witness: Ah Che Park:

In 1943 the witness loaned the appellant $1,000.00 which was not a Tanamoshi loan. The loan was repaid the same year. (R. p. 332.)

Witness: P. Y. Hong:

In 1943 the witness loaned the appellant $2,000.00 due to Tanamoshis in a Tanamoshi enterprise. (R. p. 334.)

The appellant urges that United States Instruction No. 19 which quotes the law of the Territory of Hawaii in respect to Tanamoshis as applies to the instant case, instructs the jury in effect that the burden of proof has shifted to the defendant. It is respectfully submitted that this interpretation and construction in no way is warranted under any interpretation of its context. It is noted that appellant urges that the insruction is misleading and unduly prejudicial in that it "may" give the jury the wrong impression as to the burden of proof. The question of Tanamoshis was injected into the trial court proceedings by way of defensive matter on behalf of the defendant. It is respectfully submitted that in no logical interpretation of the instant Instruction can it be reasonably concluded that any question relative to Tanamoshis was a portion of the case in chief of the plaintiff, or that matters relative to Tanamoshis being an essential element of the offense charged that the plaintiff failed to establish such fact or facts and that the instruction ergo was misleading and prejudicial in that it created the impression upon the minds of the jurors that it was incumbent upon the appellant to meet that issue.

The first two sentences of United States Instruction No. 19 are taken verbatim from the case of *Choi Heylin v. Shin Sung Yil,* 30 Hawaii 606, pages 608-609:

> "We do not know, and it is not generally known in this community, what the precise terms of a Tanamoshi are or whether all Tanamoshis are necessarily alike in all of their terms. Insofar as the law of contracts goes, the terms of one Tanamoshi may not be the same as the terms of another Tanamoshi. The courts cannot take judicial notice of the terms of such enterprises or contracts."

The last sentence of the instruction, "The burden is upon the defendant to substantiate the testimony offered by him as to Tanamoshi enterprises to establish at least a prima facie case of a loan to him." is the law upon the subject as established by the *Heylin* case, supra.

It is respectfully submitted that in view of the introduction at the trial of the testimony of the ten witnesses above referred to relative to alleged Tanamoshi dealings, the defendant upon trial did not establish a prima facie agreement or any facts of a loan by way of a Tanamoshi enterprise. It is to be noted that none of the testimony of any of the ten witnesses above quoted recited any particular dates, conditions of contribution, conditions of repayment, rates of interest, successful bidders, the names of other members of the Tanamoshi, the number of members of the Tanamoshi, or any testimony or detail whatsoever which, insofar as the law of contracts requires, would establish the relationship in law of

debtor and creditor. These factors are absent in the testimony of each and every witness, and for this reason it is respectfully submitted the mere recitation of a loan, a loan by way of Tanamoshi enterprise, or a repayment of a loan does not, under the law as enunciated in the *Heylin* case, supra, satisfy the requirements necessary to establish the existence of a Tanamoshi. The testimony of the ten witnesses in effect merely announced past financial dealings with the appellant, some by way of loan, some by way of Tanamoshi enterprise. Some of the witnesses testified as to repayments. In the circumstances it is submitted that none of the testimony of any of the ten witnesses was sufficient to establish a Tanamoshi enterprise in fact.

In view of the peculiar nature of Tanamoshi enterprises, authority upon the law relative thereto is scarce. It is conjectured that the case of *Choi Heylin v. Shin Sung Yil,* 30 Hawaii 606 (supra), is the only authority of record upon the point. This case was decided by the Supreme Court of the Territory of Hawaii on October 12, 1928. It was an action of assumpsit wherein the plaintiff claimed of the defendant the sum of $92.05 as balance due for moneys loaned and advanced by the plaintiff to and for the said defendant. The undisputed evidence showed that the plaintiff, being desirous of obtaining a loan, organized an enterprise known as a Tanamoshi, composed of twenty-one members, each of whom was to pay the sum of $20.00 per month for a period of twenty-one months. The plaintiff, as promoter or "boss" of the

Tanamoshi was to have the privilege of receiving the moneys contributed at the first meeting without bidding or paying any commissions therefor or any interest or premium, and did accordingly receive the sum of $420.00 at the first meeting, which sum was contributed by the twenty-one members at twenty dollars apiece. At each succeeding monthly meeting the $420.00 contributed was to be loaned to the member bidding the highest amount—termed interest—that is to say, a sum of money to be paid by the successful bidder to each of the members at the time of the meeting who had not yet received a loan from the association. At the meeting some three months after organization of the Tanamoshi, the defendant was successful as the highest bidder who had not yet received a loan and at that meeting the members paid $20.00 apiece and plaintiff added $80.00 to the amount contributed, making a total contribution of $420.00. Subsequently, the defendant paid to the plaintiff sixteen installments of $20.00 each on account of the loan of $420.00 which he had received, and after being credited with a minor credit, left a balance of $92.05 which the defendant had not paid to the plaintiff or to anyone else by way of reimbursement. The Court in holding first, that it could not take judicial notice of the terms of Tanamoshi enterprises or contracts and, second, that the burden was upon the plaintiff to establish at least a prima facie case of a loan to the defendant, stated at pages 608-609:

> " . . . There was no evidence before the court tending to support a finding that the $420 which

> the defendant received in January, 1926, was loaned to him by the plaintiff or a finding that the plaintiff was a trustee for the other persons who joined here in contributing the moneys which were loaned to the defendant. So far as we know 'tanamoshis' are enterprises peculiar to certain Oriental races only and were introduced in Hawaii only after the coming of considerable numbers of the people of those races. We do not know, and it is not generally known in this community, what the precise terms of a tanamoshi are or whether all tanamoshis are necessarily alike in all of their terms. Insofar as the law of contracts goes, the terms of one tanamoshi may not be the same as the terms of another tanamoshi. The courts cannot take judicial notice of the terms of such enterprises or contracts . . .
> * * * * * * * *
> "The burden was upon the plaintiff to establish at least a *prima facie* case of a loan by her individually to the defendant. This she failed to do . . ."

It is respectfully submitted that the law relative to Tanamoshi enterprises as the same was limitedly injected by way of defense in the lower Court in the instant proceedings—sustains the contention of the appellee in respect of the alleged error urged as to United States Instruction No. 19. It is further respectfully submitted—and in support thereof the appellee rests upon the arguments and authorities cited in subsection 6 of the argument herein, relative to appellant's Specification of Error No. 7—that the issue, if any, upon Tanamoshis herein and

the attending United States Instruction No. 19 given in connection therewith is of such relative inconsequence that it cannot be considered to in any manner have constituted harmful or prejudicial error resulting in substantial prejudice to the appellant or in his deprivation of a fair trial.

CONCLUSION.

It is respectfully submitted that the Trial Court did not commit error as to any of the Specifications of Error urged by the appellant, and that the judgment of the United States District Court for the Territory of Hawaii should be affirmed.

Dated, Honolulu, T. H.,
November 7, 1947.

Respectfully submitted,

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